F. & D. Nos. 2365 and 2483.
I. S. Nos. 18761-b and 8523-c. Issued September 27, 1912.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1664.

(Given pursuant to section 4 of the Food and Drugs Act.)

MISBRANDING OF MARASCHINO CHERRIES.

On April 22, 1911, and May 31, 1911, the United States Attorney for the Southern District of Ohio, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for said district two informations against The Bettman-Johnson Co., a corporation, Cincinnati, Ohio, alleging shipment by it, in violation of the Food and Drugs Act, on or about November 20, 1909, from the State of Ohio into the State of Missouri, and on or about October 14, 1910, from the State of Ohio into the State of Louisiana, of separate consignments of maraschino cherries which were misbranded in violation of the Food and Drugs Act. The first-named consignment was labeled: "Maraschino Cherries Contains harmless pure food color and less than $\frac{1}{10}$ benzoate of soda. Minuet Cordial Co. Distributors. Kansas City, Mo." The second consignment was labeled: "Maraschino Cherries Contains harmless color and preserved with less than $\frac{1}{10}$ of 1% of Benzoate of Soda. Distributed by Hy. Block Co. Ltd. New Orleans, La."

An analysis of a sample of the product contained in the first consignment, by the Bureau of Chemistry of this Department, showed the following results: Color, Ponceau 3 R; alcohol, none; polarization, direct —12.0, invert —13.2, invert 87° C., —0.0; solids by refractometer on juice, 42.0; specific gravity, 1.1872. The product was shown to have been artificially colored; the liquid was a weak sweet liqueur, highly flavored with essence of bitter almonds. Analysis of a sample of the second consignment by the Bureau of Chemistry of this Department showed the following results: Liquor: Solids, 37.95 per cent; nonsugar solids, 0.59 per cent; sucrose, Clerget, 1.18

per cent; reducing sugars as invert, 36.18 per cent; polarization direct temperature at 26° C., —9.05; polarization invert temperature at 24.5° C., —10.60; polarization invert at 87° C., —0.2; ash, 0.24 per cent; specific gravity at 15.6° C., 1.1689; alcohol, trace; hydrocyanic acid, none. Cherries: Condition, O. K.; colored with coal tar color, Ponceau 3 R; salicylates, saccharin, negative; benzoic acid, as sodium benzoate, 0.02 per cent; arsenic, none. It was also shown that the product consisted of common cherries in a weak solution flavored with bitter almonds. There were no characteristics of the maraschino liqueur such as produced from the marasca cherries of Dalmatia. Misbranding was alleged in both informations for the reasons that said article of food was then and there offered for sale and sold as aforesaid under the distinctive name of another article of food, to wit, under the name of "Maraschino Cherries;" when in truth and in fact said article of food was not then and there "Maraschino Cherries," nor did it consist of cherries packed or preserved in genuine maraschino liqueur or cordial, but said cherries were packed or preserved in a liqueur or cordial made in imitation of the genuine maraschino; a liqueur or cordial which originated, and is produced, in Dalmatia, Austria. That said article of food was then and there labeled, as aforesaid, so as to deceive and mislead the purchaser thereof, in that by said label and brand said article of food purported and was represented to be "Maraschino Cherries," or cherries packed or preserved in maraschino liqueur or cordial, when in truth and in fact said article of food was not then and there "Maraschino Cherries," nor cherries packed or preserved in maraschino liqueur or cordial. That the label and brand on said article of food, as above described, did then and there bear a statement regarding said articles of food, and the ingredients and substances contained therein, which statement was false, misleading, and deceptive, in that it purported and represented said article of food then and there to be "Maraschino Cherries", or cherries packed or preserved in genuine maraschino liqueur or cordial, which liqueur or cordial originated and is produced in Dalmatia, Austria, whereas in truth and in fact said article of food was not then and there "Maraschino Cherries," nor did it consist of cherries packed or preserved in genuine maraschino liqueur or cordial.

On September 28, 1911, motion to quash the informations was filed by the defendant, and on September 30, 1911, this motion was overruled by the court. On October 2, 1911, the defendant filed a demurrer to the informations, which was overruled by the court on the same day. On October 4 the defendant was arraigned and entered a plea of not guilty. On the same day a jury was impaneled and the trial of the cases begun. On October 6 the jury returned a verdict

of guilty. The charge of the court (Sater, *J.*) to the jury was as follows:

Gentlemen of the jury: These are important cases, as are all criminal cases. In reaching a conclusion you will not be controlled or influenced by the fact that there is, or may be, a large sum of money invested in the manufacture of the product in question. The case is to be determined according to what is right, not according to the amount involved. It arises under the Pure Food and Drugs Act, whose purpose is to prevent deceit and false pretenses in the sale of foods and drugs, and to safeguard the public health.

The charge is that the article of food produced by the defendant is misbranded. Under the Act an article of food is deemed to be misbranded if it be an imitation of or offered for sale under the distinctive name of another article, or if it be labeled or branded so as to deceive or mislead the purchaser, or if the package, or container, or its labels, should bear any statement, design, or device regarding the ingredients or substances contained therein, which statement, design or device shall be false or misleading in any particular. To that there are some exceptions, but we are not interested in them in this case.

You are the triers of the facts of this case; the Constitution makes you such. You are to determine what the facts of this case are, as developed by the evidence given before you.

In the course of the trial, and in the closing argument, counsel stated their recollection and understanding of the facts. In its charge the Court will refer to some—not all—of the facts, for the purposes of illustration and to bring to your minds the issues involved, but you are to use your recollection of what the evidence is, not the recollection of the lawyers or that of the Court. You are to consider the whole of the evidence and to determine the issues from the whole of the evidence. In so far as the arguments of the lawyers aided you in analyzing and understanding the evidence, you should avail yourselves of their assistance, but the recollection of it must be yours, and not that of the lawyers or of myself.

In the course of argument allusions were made to the law by counsel. You take your law from the Court, and not from the lawyers.

You are the judges of the weight of the evidence and of the credibility of the witnesses. In determining what weight and credibility you will give to a witness, you should consider his opportunities for knowing of matters concerning which he testified; his intelligence; his conduct on the witness stand; the probabilities or improbablities of his statements; his prejudice or interest, if any, in the result of the suit; whether he is corroborated or uncorroborated; whether he is contradicted or uncontradicted in his evidence; in short, all of the facts and circumstances which reflect on his credibility, and then determine what weight you will give to his statements.

The defendant is presumed to be innocent. This presumption is a fact to be considered in this case along with all of the other facts. It runs in its favor as to every element of the crime charged, and abides with it throughout the trial until removed beyond a reasonable doubt.

To convict, the government must convince you, and each of you, of the guilt of the defendant beyond a reasonable doubt. A reasonable doubt must be a substantial doubt arising out of the evidence of the case. It is not a mere conjured up, imaginary doubt, but a doubt for which a reason can be given; such a doubt as would exist in the mind of a reasonable man after a free, full, fair consideration of all the evidence. But the law does not exclude all doubt, because absolute certainty is not possible.

You are to pass upon two cases. They have been tried together and are to be considered on the evidence which was given before you.

It is admitted that the defendant shipped and caused to be shipped and delivered the articles named in the respective informations to the respective parties named in them They were shipped from one state to another, and passed thereby into interstate commerce. It is also admitted that the bottles so shipped and delivered were branded as set out in the information. Some of the bottles are offered in evidence, and will be subject to your inspection.

The charge which the government makes is that the article of food contained in the bottles was misbranded in the following particulars: That it was offered for sale and sold under the distinctive name of another article of food, namely, Maraschino Cherries, when, in truth and in fact, the article of food was not Maraschino Cherries and did not consist of cherries packed or preserved in genuine Maraschino liqueur or cordial, but that the cherries were packed or preserved in a liqueur or cordial made in imitation of the genuine Maraschino, a liqueur or cordial which originated and is produced in Dalmatia, Austria; that the article of food in question was labeled and branded so as to deceive and mislead the purchaser thereof, in that it purported to be and was represented to be Maraschino Cherries, or cherries packed in Maraschino, or preserved in Maraschino liqueur or cordial, while in fact the article of food was not Maraschino Cherries, and was not packed or preserved in Maraschino liqueur; that the label and brand on this article of food bore a statement regarding the article itself and its ingredients and substances which was false, misleading and deceptive, because it purported and represented such article to be Maraschino Cherries, or cherries packed in Maraschino liqueur or cordial, which liqueur or cordial originated in Dalmatia, Austria, whereas, in fact, the cherries were not Maraschino Cherries and did not consist of cherries packed or preserved in genuine Maraschino liqueur or cordial.

Such are the charges made in the respective informations. To the charges which the government has undertaken to prove the defendant has entered a plea of "not guilty," and that puts in issue each and every one of such charges.

There grows in Dalmatia, in Austria, a small, dark-colored, bitter cherry with a rather large stone. There may be some variation in the evidence as to the description of the cherry, but you will recall the evidence and be guided by it. The cherry is not edible; at least, not much eaten. It grows on a small tree in places which one of the witnesses, at least, has said are barren. It does not grow in orchards. The government has introduced evidence to show that the tree is indigenous to Dalmatia, and that efforts to transplant it have not been successful, and that the cherry loses flavor when transplanted. The cherry which grows on the tree is called the Marasque cherry. From the pulp of the cherry and the leaves of the tree, so the witness Koch states, is distilled Maraschino. Bodman further testified that Maraschino is produced from the cherry and the leaves and bark of the tree.

Maraschino is not a cherry. It is a liqueur or cordial high in alcohol, the percentage of which has been variously stated by different witnesses, some giving as high as seventy per cent. Its characteristics, of course, you will determine from the evidence. There is also evidence to show that it has a peculiar flavor; the fact as to that you will also determine from the evidence. Bodman wished to purchase, so he has told you, three thousand gallons of Maraschino, and that the capacity of the producing distilleries was such that from twelve to fifteen thousand gallons could have been furnished. He named four distilleries of which he learned while in Dalmatia, three of which, as I

recall his evidence, he visited. The witness Koch named six, and testified that the liqueur or cordial is drank as a beverage, and described the use of paper discs which are used to preserve as long as possible the flavor. Bettman has testified that it cannot be drank, or at least that it is not used as a beverage. His precise statement you must yourselves determine. It is for you to say which of these two witnesses you believe,—which had the best knowledge of its use as a beverage.

The liqueur or cordial Maraschino was originally made in Dalmatia a long time ago, and it has been stated here that two of the houses still in existence and producing it are more than a hundred years old.

There is evidence that considerable quantities of the cherries have been dried and exported, mainly to Germany, and that the liqueur or cordial Maraschino has been exported to various countries which have been named in your presence. Bodman testified that he bought a quantity of it to be used in his business at Ludlow, Kentucky, and that in the use of it he reduces the percentage of alcohol from about seventy per cent to one per cent. Bettman told you of his inability to find it in this city some time ago but did find some in New York and purchased it. If this occurred, however, after the information was filed, then you should not consider his purchase as reflecting on the extent of the commercial use of Maraschino before the suit was brought. You should so consider the evidence of Bodman also, if his purchase occurred subsequent to the filing of the information. Brachman, a Cincinnati merchant, testified that he has handled Luxardo's Maraschino since 1873, but that the sales have been limited. The witness Hart testified that he bought Maraschino twice, that he had the Maraschino distillate five or six years ago and had seen a few bottles of the Maraschino Cherries. Hilts conducted examinations of Maraschino, perhaps half a dozen of them, he says, in 1909; that in some of the samples that he examined in his study of Maraschino he found it present, and in others he did not; that that which was made by Luxardo, of Zara, was strong, genuine Maraschino. Thomas testified to assistance rendered his father, an importer of wines, liqueurs, and the like, while doing business in San Francisco, which assistance extended down to about the year 1897. He detailed to you what his services were and that he sampled everything that was bought in that business. He said that for the purposes of that business there were imported both French and Dalmatian Maraschino; that cherries in Maraschino were also imported by his father and also cherries which were designated as "Cherries au Marasquin."

The evidence has thus been reviewed to reflect on and call your attention to the extent of the commercial use of Maraschino and to its properties. I do not pretend to call your attention to all of it, but you will consider all of it, whether reviewed or not; and you will, as I have heretofore said, determine the value of the evidence of each witness.

The defendant claims, as I understand, that the tree which grows in Dalmatia and yields the Marasque cherry of that country is not indigenous, but that it grows elsewhere. You will determine from the evidence whether or not the same tree that grows in Dalmatia, the same kind of cherry that grows there, is found growing in other countries.

You will also determine from the evidence whether Maraschino is produced in other countries or not, and whether, if it is so produced, it is the same article, the same character of article, as that produced in Dalmatia.

The defendant's position is substantially this: It admits that the cherries used by it and its predecessor partnership are not and have not been Maraschino Cherries. The cherries used by the defendant in its business are obtained

in Greece, France, some of the Western States, and perhaps elsewhere; the names of some of them have been given you, as Queen Anne, Royal Anne, Bigarreaux, etc. There is no Maraschino used in the manufacture of the defendant's article. It is not present at all. The cherries used by the defendant were shipped here in brine, and sulphur in some form appears to be present in such brine. They are washed and prepared in a manner that I do not understand, but which is not important in the determination of these cases. The effect of the early treatment of them is to render them colorless, and if not tasteless, then so as to remove a portion at least of the taste. They are then colored red, and are placed in a syrup or liquid and a bitter flavor is given them by the use of almonds or oil of bitter almonds, whichever it is.

As I recall the evidence, there is no such cherry grown or known in fruit growing as Maraschino Cherries—no natural product which bears that name. There is evidence here, given by Thomas, that the article prepared by the defendant does not have the taste or flavor of Maraschino, but that both the defendant's article and the true Maraschino have a bitter taste. The defendant's article, if I recall the evidence rightly, has no alcohol present. In Maraschino there is alcohol. The defendant's product has gone into extensive use in many ways which have been named in your presence. The article is produced and sold annually in large quantities. The manufacture of it began in 1894. The manufactured product was called Maraschino Cherries and has been known by that name ever since. Bettman says that the name was applied as an arbitrary name, as a fanciful name. Keifer, if I recall his evidence correctly, stated that it was made to imitate the French article; that there was an analysis made of the French article to determine its composition, with a view to manufacturing a similar product.

As I have said heretofore, the record fails to show any cherry that is a natural product which bears the name of Maraschino Cherries. Such a cherry is not known in cherry culture. The defendant, in its use of cherries, has not limited itself to any one kind of cherry. It does not use the Marasque Cherry. It claims that its cherries are the principal thing in its product and that the syrup may be thrown away. Its position is that it gave a name to its cherry which is unlike and different from the name of any cherry ever theretofore known or sold, and that it first applied the name Maraschino Cherries; that no cherries packed or preserved in genuine Maraschino have ever been known as Maraschino Cherries; that when it applied the term Maraschino to its cherries that term had never been applied to any natural cherry or treated cherry; that their article went into extensive use and became known and used in this country and elsewhere as Maraschino Cherries; that in commerce, and so far as the public is concerned, the name Maraschino Cherries, as used by it, is a true name, and not suggested by any other cherry than their own product, and that it is consequently not a fraud or deception or a misleading name; that the term Maraschino means, and has come to mean, something else than the distillate of the Marasque cherry, and that this is on account of the extensive use of defendant's product, and on account of what the defendant claims is the style or custom of today, and of the little knowledge of the genuine Maraschino and the small supply available for use; that their product named Maraschino Cherries is a food product, a fruit in a liqueur or cordial prepared for such fruit.

Such are the claims made in behalf of the defendant; and if you find that the claims so made are sustained, you need go no further, but return a verdict for the defendant. If you do not find the defendant's claims sustained, then you must go further and consider in detail the claims of the government, and I shall now proceed to state them.

The government claims that Maraschino is a liqueur or cordial first made in Dalmatia; that it entered largely into commerce, into that of European countries which have been named and also into the commerce of this country, and that it thereby became known to dealers; that it possesses a peculiar and distinguishing flavor of its own; that when the term "Maraschino" is applied to an article it carries by implication the meaning and is understood and has been understood to mean an article packed or preserved in and possessing the flavor and qualities of Maraschino; that the cherries of the defendant are not Maraschino Cherries, as known as a natural product and in fruit culture; that they are not the Marasque Cherry, from which Maraschino is made; that no Maraschino whatever is used by defendant in connection with its product, and that no such thing as Maraschino Cherries is known, as I have just said, in fruit culture or as a natural growth; that the product of defendant has neither the flavor nor quality of Maraschino, and that the application and use of the term Maraschino to and in connection with the word "cherries" imports and suggests that the cherries are cherries from which Maraschino is made—that is to say, Marasque Cherries,—or that the defendants product is packed and preserved in Maraschino and that such is the common understanding, the ordinary purchaser's understanding; that in the commercial world Maraschino is so well known, its quality and characteristics so well understood, its name so distinctive, that it occupies a field by itself, and that the name Maraschino is limited to the liquor, or liqueur, or cordial, called Maraschino, and that the name has never acquired a general, or more general, or different meaning than that arising from its being associated with the distillate of Marasque Cherry; that the name Maraschino could not be appropriated by the defendants, or others, or any other article, without misleading the public; that the name Maraschino is the name of a real, genuine, valuable article of commerce, never applied to a natural cherry with natural color and flavor, or to a cherry which, by its earlier treatment, loses its color and flavor and then by subsequent treatment is given color and flavor in preparation for the market, some of the original flavor being perhaps retained, notwithstanding the treatment in shipping and the effect of sulphur, as well as the brine.

The government claims that the appropriation of the name conveyed and does convey the belief that defendant's article possessed and possesses the flavor of original Maraschino; that the name was applied to cherries which have none of the characteristics of Maraschino to induce the belief that those qualities are present, and that such use of the name is a misnomer and the placing of it on the label is a misbranding, and that the misbranding is done to deceive and mislead the purchaser into the belief that he is buying an article possessing the characteristics and qualities contained in true Maraschino, when in fact he is not. The ordinary purchaser is one who gives such attention to the article he wishes to buy as could be reasonably expected, and it is that kind of a purchaser which the government claims is misled. It claims that the statement and name on the defendant's labels are false, misleading and deceptive as regards the cherries,—the article of food,—and the substance or ingredients which compose or enter into it and the liquid which surrounds such cherry; that the term "Maraschino" suggests an origin, character and place of manufacture, which is untrue, and leads the purchaser to believe that what he buys is a thing other than what he gets. That, as I understand, is the government's claim; and if you find that that claim is sustained by the evidence, beyond a reasonable doubt, then it is your duty to say so, and to do so notwithstanding the length of time the defendant and its predecessor have used the name of Maraschino Cherries. For, if the name put on the label is a misbranding, a false, deceptive and misleading name, then its continued use would not make it legal.

You will decide whose contentions are correct, and whether, under the facts and the law, defendant is guilty of a misbranding and mislabeling, or not. You will act impartially and conscientiously. When you retire to the jury room you will name one of your number as foreman, and when you have reached a conclusion you will report your verdict.

On October 9 the defendant filed motions in arrest of judgment and for a new trial which were argued and submitted on October 16, 1911. On February 2, 1912, the court overruled these motions and sentenced the defendant to pay a fine of $100 and costs, amounting to $73.06.

W. M. HAYS,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *May 21, 1912.*

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